NOT FOR PUBLICATION -- FOR UPLOAD TO WWW.VID.USCOURTS.GOV

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Crim. No. 1998-001**
RAFAEL GOMEZ DEL ROSARIO,	)	
EDDY CALISSE CHERYS, and	)	
JUAN FRANCISCO LIZARDO,	)	
	)	
Defendants.	)	
	)	

APPEARANCES:

Nelson Jones, Esq.
Assistant U.S. Attorney
St. Thomas, U.S.V.I.
For the plaintiff,

Anna H. Paiewonsky, Esq.
St. Thomas, U.S.V.I.
For the defendant Eddy Calisse Cherys

Karin A. Bentz, Esq.
St. Thomas, U.S.V.I.
For the defendant Juan Francisco Lizardo.

MEMORANDUM

MOORE, J.

The motions of defendants Eddy Calisse Cherys and Juan Francisco Lizardo for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29 and, in the case of Mr. Lizardo, an alternative motion for new trial pursuant to Rule 33 will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January, 1998, the grand jury returned a three-count indictment charging Rafael Gomez Del Rosario ["Del Rosario"], Juan Francisco Lizardo ["Lizardo"], and Eddy Calisse Cherys ["Cherys"] with conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 (Count I), conspiracy to import cocaine into the United States from a place outside thereof in violation of 21 U.S.C. § 963 (Count II), and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count III).

Co-defendant Del Rosario pled guilty and testified against Lizardo and Cherys. The jury convicted Lizardo on all three counts and Cherys on Counts I and III.

A. The Government's Case

The government alleged that Lizardo, Del Rosario and a third person traveled far south of St. Thomas in a specially equipped boat and retrieved 315 kilograms of cocaine, which had been dropped from a plane. They traveled back to St. Thomas, where they attempted to bury the cocaine on Lerkenlund Beach before daybreak. Del Rosario stayed with the cocaine, while the others left with the boat. A resident in the area, upon seeing the suspicious activity, called a policeman who lived nearby. That officer then discovered the drugs covered in sand on the beach

and called his brother, also a policeman. The two officers found Del Rosario in the bushes. They later arrested Cherys and Lizardo driving in the vicinity of Lerkenlund Beach.

B. The Evidence

At trial, Del Rosario testified that he arrived in St. Thomas in late 1997 and thereafter met Lizardo, who agreed to pay him to help pick up drugs from offshore and bring them to St. Thomas. Del Rosario, Lizardo, and a third person boarded a vessel loaded with extra gas tanks. They traveled south from about 4:00 a.m. to 3:00 p.m. At about 6:30 p.m., an aircraft circled and then dropped ten packages or bales covered in heavy sacks and marked with fluorescent lights and numbers. One of the sacks apparently broke open during the dropping operation. The men picked up the bales and returned to St. Thomas, arriving at about 4:30 a.m. (Tr. Vol. I at 129-140.) Del Rosario testified that the boat carried just under 400 gallons of fuel. (*Id.* at 139-40.) Del Rosario and the third man took the bales onto the shore of Lerkenlund Beach, tried to bury them, but, unable to do so because of the rocky beach, hid all but two bales in the bush. Del Rosario stayed on the beach, hidden behind a shrub.

Officer Shawn Querrard testified that early on the morning of December 9, 1997, he was called by a local resident who had seen suspicious activity. He met the resident and the two

traveled together to the beach. (*Id.* at 33-34.) He uncovered one of two suspicious mounds and determined that drugs were present. He told the resident to leave the area and then called his brother, Officer Rodney Querrard, who joined him at the beach. Rodney Querrard observed an individual in the bushes wearing wet jeans, a wet sock, and no shirt, and took him into custody. (*Id.* at 81-83.) Other law enforcement officers arrived, including Lieutenant Villanueva, a member of the High Intensity Drug Trafficking Area ["HIDTA"] Unit, who advised the man, eventually identified as Del Rosario, of his rights.

At trial, Lt. Villanueva testified that Del Rosario, after being advised of his rights, related that two men would be returning with food. (Tr. Vol. II at 12-13.) He later seized a boat at Tropical Marine that matched the description of the boat Del Rosario described. (*Id.* at 51.) Villanueva also retrieved a fax authorizing the release of the boat to, as other evidence showed, an "Eddy Cherys." (*Id.* at 52-54.) One of the owners of Tropical Marine testified that she received the fax authorizing the release of a vessel to Eddy Cherys. She testified that she did indeed release a vessel to an Eddy Cherys per the fax, but did not identify him in court. (*Id.* at 158-161.)

While at the HIDTA offices, Rodney and Shawn Querrard received a call about a suspicious vehicle near Lerkenlund beach.

They were unable to find that vehicle, but did notice a red sedan proceeding very slowly, with both occupants looking in the direction of Lerkenlund Beach. (Tr. Vol. I at 92.) The driver of the car, Cherys, appeared to notice the police vehicle and sped up. Sergeant Rodney Querrard then made a traffic stop. (*Id.* at 93.) Lizardo was seated in the front passenger seat. After Lizardo got out of the car, Rodney Querrard retrieved from the open glove compartment in plain view a coiled red plastic cable with keys attached, which he associated with outboard engines. Cherys and Lizardo were arrested. (*Id.* at 93-97.) The keys retrieved by Officer Querrard were later used to start the engines on the boat seized by Lt. Villanueva. (Tr. Vol. II at 68.) The next day, Villanueva inventoried Cherys' red sedan and seized two quarts of two-cycle oil of the type used in marine outboard engines. (*Id.* at 49-50.)

II. DISCUSSION

In support of his motion, Cherys asserts that there was insufficient evidence that he "knew about any controlled substances," that he "conspired, agreed or entered into any understanding to possess with intent to distribute a controlled substance," or that he "knowingly and intentionally possessed with intent to distribute cocaine." (Def. Cherys' Mot. at 3-4.)

Additionally, Cherys claims chain of custody shortcomings with his car, the boat keys, and the cocaine. He contends he was denied the opportunity for independent drug testing and that improper summation arguments were made by both the government and counsel for co-defendant Lizardo. Cherys also claims that the boat was improperly and inadequately identified, and that the Court failed to instruct on the issue of specific intent, improperly disallowed a witness to testify as a marine expert, and erred by not severing the defendants' cases.

In support of his motion for judgment of acquittal, Lizardo alleges insufficient evidence to establish conspiracy and possession with intent to distribute, error in identifying him as the perpetrator, and error in the admission of Del Rosario's statement as a prior consistent statement. In support of his motion for new trial, Lizardo raises some of the same arguments raised in his motion for judgment of acquittal, but also argues prejudice based on the government's failure to disclose an out-of-court identification and its interference with the production of a witness to refute a co-conspirator's testimony. Lizardo also complains that the translator was not certified.

A. The Defendants' Rule 29 Motions for Acquittal

In reviewing defendants' arguments for judgment of acquittal, this Court must determine whether there was

substantial evidence upon which a reasonable jury could have based its verdict. *See United States v. Obialo*, 23 F.3d 69, 72 (3d Cir. 1994). The Court must view the evidence in the light most favorable to the government and draw all reasonable inferences therefrom in the prosecution's favor. *See United States v. Forde*, No. 97-7469, slip op. at 5 (3d Cir. Nov. 6, 1998).

1. Sufficiency of the Evidence

Both defendants argue that the evidence was insufficient to show they entered into the unlawful agreement to support the conspiracy count and to prove that they knowingly and willfully joined the conspiracy.[1]

The government need not prove the existence of a formal agreement. The elements of the conspiracy may be proved "entirely through circumstantial evidence." *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986), *cert. denied*, 475 U.S. 1024, 106 S.Ct. 1220 (1986). The existence of a conspiracy can be shown by "evidence of related facts and circumstances from which it appears as a reasonable and logical inference, that the

[1] Cherys asserts that there was no evidence of intent to distribute other than the sheer amount of cocaine seized, that "there is no 'legal presumption' as to how much [cocaine] is necessary to constitute intent to distribute," and that therefore, somehow, "the Court has directed a verdict in favor of the government" or "took judicial notice" as to intent to distribute. (Def. Cherys' Mot. at 13-14.) Such assertion is without merit. The jury had sufficient evidence before it to determine whether the **315 kilograms** was for personal consumption of the three co-defendants.

activities of the participants . . . could not have been carried on except as the result of a preconceived scheme or common understanding." *United States v. Ellis*, 595 F.3d 154, 160 (3d Cir. 1979), *cert. denied*, 444 U.S. 838 (1979).

Here, there was sufficient evidence for the jury to reasonably conclude that Del Rosario and Lizardo entered into a conspiracy both to import cocaine and to possess cocaine with the intent to distribute. There was also sufficient circumstantial evidence for the jury to conclude that Cherys joined that conspiracy to possess the cocaine.

Based on the same evidence, the jury reasonably convicted both defendants as either active participants or aiders and abettors of the underlying substantive offenses. Additionally, based on the conspiracy conviction, there was sufficient evidence to convict them of all the substantive offenses committed by the other members of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 645 (1946).

2. Chain of Custody

Cherys asserts problems with the chain of custody of the boat keys found in his car's glove box, the two-stroke motor oil found in his car, and the 315 kilograms of drugs:

(1) Rodney Querrard testified that he gave the keys he took from Cherys' glove box to either Marine Enforcement Officer Wade

or Lt. Villanueva. MEO Wade, who moved the boat to the HIDTA dock, identified the keys in evidence as the keys he had used to start the boat's engines.

(2) Shawn Querrard testified that he drove Cherys' red sedan to the HIDTA offices after Lizardo and Cherys were taken into custody. An inventory search of the vehicle was conducted the next day by Lt. Villanueva. In the trunk of the vehicle he found the two-cycle oil, which was admitted into evidence.

(3) Special Agent Jennings packed the ten bales of cocaine into ten boxes and shipped them to the Drug Enforcement Agency ["DEA"] in Puerto Rico, where Randles, another DEA agent and pilot, repackaged the drugs into twenty-six boxes because the ten original boxes were too big. Agent Randles then flew the boxes to the DEA lab in Florida. The DEA chemist took samples from ten of the twenty-six boxes and each tested positive for cocaine.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a).

> To establish a proper chain of custody, the government must establish that the evidence is in substantially the same condition as when it was originally seized. The trial judge can find a proper chain of custody and admit evidence such as tape recordings if "there is a reasonable probability that the evidence has not been altered in any material respect." To show a lack of material alteration, the

> government only needs to show it took reasonable steps to prevent tampering. The government need not exclude all possibilities of tampering. Unless the defendant offers evidence to the contrary, the trial judge can rely on the "presumption of regularity in the handling of exhibits by public officials."

United States v. Ford, 1992 WL 368372, *5 (E.D. Pa., Dec. 4, 1992) (citations omitted). The evidence was properly admitted, since the government provided enough information to reasonably support a finding that the evidence was what the government claimed it to be. Cherys' alleged "deficiencies" go to the weight of the evidence, not its admissibility.

On a related note, Cherys argues that he was denied the right to independently test the drugs. He hired a private investigator to verify the procedures used by the DEA to obtain and ship samples of the cocaine to the defendants' chemist. The investigator was present when samples were taken out of ten boxes containing the individual kilogram packages. Cherys argues that there was no way to know if these ten boxes were a subset of the 26 sent to DEA. The Court disagrees and finds that the government made a sufficient showing that the samples were taken from the drugs seized at Lerkenlund Beach.

3. Summation

Defendant Cherys argues that both the government and co-defendant gave improper summation. Insomuch as summation given by co-counsel cannot be imputed to the government, that assertion

lacks any merit. As for the government's summation, Cherys asserts that the government misstated elements of several witnesses' testimony. The Court instructed the jury thus:

> During the course of argument by all counsel, extensive reference has been made to the testimony and I am satisfied that you have a full understanding and a good grasp of the evidence. Therefore, no useful purpose would be served for me to tell you how I remember the evidence other than as I may have used it to illustrate these instructions. It is your recollection that is controlling -- not counsels', nor mine.

(Jury Charge; *see also* Tr. Vol. V at 116-17.) The jury being thus instructed, Cherys' assertion is without merit.

Cherys also contends that the government's summation implied that Cherys "had a duty to prove" various facts. (Def. Cherys' Mot. at 37-38.) Merely pointing out what the government perceived to be weaknesses in Cherys' defense did not imply that Cherys had to prove his lack of guilt. Further, the Court thoroughly instructed the jury on the elements of the charges and that the government retained the burden of proving those charges at all times.

4. In-Court Identification of the Boat

Defendant Cherys asserts that the in-court identification of the boat was improper because it was based on a single photograph and because the existence of a second vessel was kept from

Cherys, therefore precluding the opportunity to put on a defense or effectively cross-examine Del Rosario.

With respect to identification through the use of a single photograph, Cherys provides no basis and cites no case law that would lend any credence to this claim. Further, Cherys' objection, which the Court overruled at trial, was based on a lack of testimony about what the boat looked like. (Tr. Vol. II at 161.) Any merit that objection may have had was immediately obviated when the witness, Del Rosario, testified that he knew the boat from "[t]he front part of the boat . . . [which] identifies it," and he testified about other features of the boat. (*Id*. at 161-62.)

Regarding the existence of a second vessel, Cherys has failed to demonstrate how this evidence might have been exculpatory, especially since Del Rosario identified the actual boat he used, aboard which he spent several daylight hours.

5. Specific Intent Instruction

Cherys asserts that the Court committed error when it failed to give his requested specific intent instruction on the

conspiracy charge.[2] There is no basis to the defendant's assertion, and the Court will deny his motion on this ground.

First, the Supreme Court directs that no jury instruction should be given for the term "specific intent," because such instructions tend to be misleading. *See Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985); *see also* E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 17.03 (4th ed. 1992). Second, Cherys' proposed instruction is entirely inapposite to the conspiracy charge in this case because it would require the government to prove that the defendant acted "with the specific intent to injure, opress threaten [*sic*], or intimidate the persons in the free exercise or enjoyment of their constitutional rights." This language has no

---

[2] Defendant Cherys requested the following instruction on specific intent:

> The offense charged in Count I requires proof beyond a reasonable doubt of specific intent before the defendant can be found guilty. You must find the defendant not guilty of Count One of the Indictment, unless and until you find that the government has proven beyond a reasonable doubt, in addition to the each [*sic*] and every one of the other elements, the element that the defendant had the specific intent to commit the acts charged in the Indictment
>
> Specific intent, as the term implies means more that the general intent to commit the act. To establish specific intent the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> In this case, the government must prove beyond a reasonable doubt that each defendant acted with an evil and bad purpose and with the specific intent to injure, opress threaten [*sic*], or intimidate the persons in the free exercise or enjoyment of their constitutional rights.

relation to the charges on which the defendants went to trial. Third, the Court's instructions fully addressed the *mens rea* and state of mind required for conviction of the conspiracy charges.

The essence of a criminal conspiracy is an understanding or agreement to commit an unlawful act. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975). The mental element the government must prove beyond a reasonable doubt is that a defendant acted in agreement with another, deliberately and not by accident or coincidence, knowing the purpose of the agreement or understanding. *See United States v. Bailey*, 444 U.S. 394, 405 (1980) ("'[P]urpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." (citations omitted)). The Court accordingly instructed the jury that, in order to convict on conspiracy with intent to distribute or import a controlled substance, the government had to prove as one of the elements that the defendant "*deliberately* joined the conspiracy, agreement, or understanding," *i.e.*, that the defendant acted *on purpose*. (Tr. Vol. V at 26 (emphasis added).) This was reiterated later in the instruction that "[t]he government must, however, prove that the defendants, either or both of them, *knowingly and deliberately* arrived at some type of agreement or understanding . . . ." (*Id.* at 27 (emphasis added).)

The Court summed up the mental element required as follows:

> Before the jury may consider that either one or both of these defendants or any other person became a member of the conspiracy charged in Count I and II of the Indictment, the evidence of the case must show beyond a reasonable doubt that either or both of the defendants *knew the purpose or goal of the agreement or understanding, and then, knowing that purpose, deliberately entered into the agreement intending by their entering into it* in some way to accomplish the goal or the purpose of this common plan or joint action.

(*Id.* at 28 (emphasis added).) These instructions more than adequately described the state of mind with which the government was required to prove each defendant acted for the jury to return convictions on the conspiracy counts.

6. Severance of the Defendants

Cherys contends that the Court erroneously denied his pre-trial motion to sever the defendants under FED. R. CRIM. P. 14. His assertion adds nothing to the arguments in his pre-trial motion, and therefore the Court sees no reason to alter its prior ruling. There was no serious risk that a joint trial would compromise any of Cherys' specific trial rights or prevent the jury from making a reliable judgment about guilt. *See Zaffiro v. United States*, 506 U.S. 534 (1993). Prejudice may be shown where co-defendants give antagonistic or mutually exclusive defenses, *see id.*, or where a co-defendant's extrajudicial confession is admitted and incriminates the other co-defendant, *see Bruton v.*

United States, 391 U.S. 123 (1968). Cherys has shown no basis on which one could reasonably conclude that he was prejudiced in any way by the joinder.

B. Lizardo's Rule 33 Motion for New Trial

Lizardo moves in the alternative for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." FED. R. CRIM. P. 33. However, a criminal defendant is entitled to a fair trial, not a perfect one. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681, (1986).

The decision whether to grant a new trial is in the trial court's sound discretion. *See Government of the Virgin Islands v. Commissiong*, 706 F. Supp. 1172, 1184 (D.V.I. App. Div. 1989). The Court stated:

> The court can grant the defendant's motion on one of two grounds: First, the court may grant a new trial if, after weighing the evidence, it determines that there has been a miscarriage of justice. Second, the court must grant a new trial if trial error had a substantial influence on the verdict.

Id. (citations omitted);[3] *see also Government of the Virgin Islands v. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982). A judge should order a new trial only in those exceptional circumstances where the evidence heavily disfavors the jury's verdict. *See Government of the Virgin Islands v. Leycock*, 19 V.I. 59, 62 (D.V.I. 1982).

Having reviewed the evidence, the Court does not find that the jury's verdict worked an injustice or that any possible trial error had a substantial influence on the jury's decision. For example, although Del Rosario refused to identify Lizardo in court as the person who recruited him, he did tell the jury that the man with him during his advice of rights by the magistrate judge on December 10, 1997, was also the captain of the boat,

---

[3] Even though the *Commissiong* decision is a ruling of the Appellate Division of this Court, it is pertinent to this district court case, as the following makes clear. The Virgin Islands is an unincorporated territory of the United States. Under its authority over the territories granted in Art. IV, § 3, cl. 2, of the Constitution, Congress has provided for governance of the Virgin Islands through the Revised Organic Act of 1954. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1994), *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995 & Supp. 1997) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"]. The Revised Organic Act vests local appellate review in an "Appellate Division" of the District Court of the Virgin Islands, consisting of the two district judges of the District Court of the Virgin Islands, plus a judge from the local trial court, as the first tier of appellate review over all decisions of the Territorial Court. *See* REV. ORG. ACT § 23A(a), 48 U.S.C. § 1613a(a). Although the Appellate Division is substantively of the nature of a local court, it is procedurally bound by the Federal Rules of Criminal Procedure, which also apply generally to criminal proceedings in the Territorial Court. *See* TERR. CT. R. 7 ("The practice and procedure of the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the . . . Federal Rules of Criminal Procedure.").

Lizardo. (Tr. Vol. I at 143-44, 154-56.)[4] Officer Villanueva, who had been with Del Rosario and the defendants in the magistrate judge's courtroom on December 10, 1997, then pointed

---

[4] From the direct examination of Del Rosario:

Q: Did the police find you on the beach?
A: Yes
Q: What happened when they found you?
A: The arrested me.
Q: Did you speak to a Lieutenant Thomas Villanueva?
A: Yes.
Q: Prior to speaking to Lieutenant Villanueva, did he advise you of your rights?
A: Yes, he did.
Q: And did you agree to speak to him.
A: Yes.
Q: What did you tell him with respect to you involvement in this venture?
A: What I have said now.
Q: Did you tell him who else was involved with you?
A: Yes.
Q: Now, is the person you spoke to as Mr. Lizardo, is he in court here today?
A: He doesn't see him. (interpreter relating Del Rosario's statement in the third person)
. . . .
Q: Now when you were arrested and brought to court here on December 10th, 1998, [sic] there were two other men here with you for the same case; were there not?
A: Yes.
Q: And one of those men was Mr. Lizardo; is that correct?
A: Yes.
. . . .
Q: Now, the gentleman that was in court with you on the December 10th, 1997, was identified back on December 10th, 1997 as one Juan Francisco-Lizardo.
A: Yes.
Q: Is that the same Lizardo referred to as the pilot of the vessel?
A: (after the Court overruled defendant's objection) Yes.
. . . .
Q: The question is, is the man that came to court with you on December 10th, 1997 as Juan Francisco-Lizardo, is he in court today?
A: He says he is not here. (interpreter relating Del Rosario's statement in the third person)
The Court: I'm sorry?
Witness: No, he's not here.

out Lizardo in the courtroom and identified him as the man he saw with Del Rosario and defendant Cherys at the advice-of-rights hearing. (Tr. Vol. II at 35.) This identification of Lizardo as the pilot of the boat substantiates the jury's verdict.

1. Del Rosario's Out-of Court Identification and the Government's Failure to Disclose the Photo Array

Defendant Lizardo asserts that the government did not provide him with exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by not providing a copy of a photo array containing Lizardo before trial, although Lizardo gives no hint why the photo array was exculpatory. Even though Del Rosario had already testified without objection that he had identified Lizardo from a photographic array shown to him before trial, (Tr. Vol. I at 144-48),[5] the defense objected when the prosecutor attempted to show Del Rosario the photo array. At a bench conference, Lizardo's counsel asserted that she had never seen the array and argued that it should be excluded in any event as unduly suggestive. (Tr. Vol. I at 148-51.) After checking its file, the government acknowledged that the photo array had

---

[5] Again, from the direct examination of Del Rosario:

Q: Did you view some photographs at the office where Mr. Villanueva was?
A: Yes.
Q: Did you select Mr. Lizardo?
A: He selected Mr. Lizardo. (interpreter relating Del Rosario's statement in the third person)

not been provided to defense counsel in discovery and withdrew its offer or request to show it to Del Rosario. As noted above, the prosecutor went on to establish through Del Rosario and Lt. Villanueva that the man who piloted the boat which picked up and brought the drugs to St. Thomas was defendant Lizardo, with whom Del Rosario had appeared in court after all three had been arrested.

Since Lizardo successfully kept the photo array out of evidence, he can claim no prejudice from the government's failure to disclose it before trial. Even if the photo array had been highly suggestive, Del Rosario nevertheless refused to identify Lizardo in court. Understandably, Lizardo made no attempt to use the excluded array to impeach Del Rosario by trying to show it was unduly suggestive. Most importantly, Lizardo did not ask the Court to strike Del Rosario's testimony that he had identified the defendant from a photo array before trial. Mr. Lizardo thus has utterly failed to show that he suffered any prejudice as a result of the handling of the excluded photographic array.

2. Problems With Translator

Defendant Lizardo asserts that problems with translation rendered the trial fundamentally unfair, without indicating where in the record he requested a new translator. Rather, Lizardo's objections to the translator went to specific translations, none

of which prejudiced the defendant's case. Any shortcomings in the translations did not result in a miscarriage of justice or substantially influence the jury.

3. Rule 801(d)(1)(B)

Mr. Lizardo argues that Villanueva's testimony concerning the content of Del Rosario's statements to him the night he was arrested was inadmissible hearsay. The pertinent rule of evidence provides that

> [a] statement is not hearsay if
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

FED. R. EVID. 801(d)(1)(B). Over the objection of Lizardo, the Court allowed Officer Villanueva to repeat what Del Rosario himself had already told the jury during the first day of the

trial. (Tr. Vol. II at 26-31.)[6] The government urged its admission as a prior consistent statement.

The *sine qua non* of the rule is in-court testimony which has been challenged before the jury as the product of an improper motive or as fabricated after the event. Here, Lizardo asked Del Rosario no questions, and Cherys only cross-examined Del Rosario about the boat and boat trip. There thus was no challenge before the jury of Del Rosario's testimony by defendants, let alone "an express or implied charge against [Del Rosario] of recent fabrication or improper influence or motive." The best that the government has come up with is the suggestion by Lizardo's attorney that she believed Del Rosario was "mistaken" when he testified that Lizardo was the man with him at the advice-of-rights hearing in court on December 10, 1997. (Tr. Vol. II at

---

[6] Again, from the direct examination of Del Rosario:

Q: [D]id he [Del Rosario] tell you with respect to the interview after he was taken to the third floor. [sic]
A: He explained the whole thing to me, beginning with the date prior, when they first set out.
Q: Can you tell us precisely what was told you?
A: Yes. He said that --
(Lizardo's attorney objected that the answer would constitute hearsay. After a discussion at sidebar ensued, the Court allowed the testimony based on the prosecutor's Rule 801(d)(1)(B) argument.)
Q: Going back to the third floor of the HIDTA building, you indicated you were interviewing Mr. Del Rosario.
A: Yes.
Q: And the question was: What did Mr. Del Rosario tell you concerning what had taken place?
(Officer Villanueva then testified to what Del Rosario told him about the night he was arrested. (*Compare* Tr. Vol. II at 32-34 *with* Tr. Vol. I at 130-141.).)

31.) Since the purpose of Rule 801(d)(1)(B) is to allow rehabilitation of a witness by showing that his statements are consistent with statements made before the alleged recent fabrication, there must be testimony that is impeached by an implied or express charge. "The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome v. United States*, 513 U.S. 150, 157-58 (1995). The government has not demonstrated that Del Rosario had been impeached in front of the jury, and a suggestion at sidebar that a witness may be mistaken does not rise to the level of an implied charge of recent fabrication.

Rule 801(d)(1)(B) also requires that the prior consistent statement precede any motive for the alleged recent fabrication. The government claims that the motive to fabricate arose after Del Rosario's initial statements to Lt. Villaneuva, when Del Rosario became concerned for his family after fingering Lizardo and asked for protection for them. While fear for his family's safety might have provided a motive for Del Rosario to falsely deny seeing Lizardo in the courtroom, Villanueva's regurgitation of Del Rosario's testimony to the jury had nothing to do with the notion that Del Rosario lied when he failed to identify Lizardo in court. The Court agrees with Mr. Lizardo that the motive to fabricate arose at the instant of arrest, and thus came before

the prior consistent statement was made. Accordingly, the Court agrees that it was error for the Court to have allowed Lt. Villanueva to give the hearsay testimony of what Del Rosario told him during the interview shortly after his arrest.

This error in admitting part of Lt. Villanueva's testimony does not end the inquiry, however. The Court must further determine whether the error was harmless, that is, an "error, defect, irregularity or variance which d[id] not affect substantial rights." *See* FED. R. CRIM. P. 52(a) ("Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). A determination of non-constitutional "'"harmless error" requires a "high[] probabil[ity] that the evidence did not contribute to the jury's judgment of conviction.'" *See Nibbs v. Roberts*, 31 V.I. 196, 225 n.18, 1995 WL 78295, *1 n.18 (D.V.I. APP. DIV. 1995) (quoting *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976)); *see also United States v. Quintero*, 38 F.3d 1317, 1331 (3d. Cir. 1994). "'High probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant,' but need not disprove every 'reasonable possibility' of prejudice." *Id.* (citing *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986)).

Here, the erroneously admitted testimony of Lt. Villanueva did no more than recount the substance of what Del Rosario himself told the jury. While the identification of Lizardo as the perpetrator certainly went to the heart of this case, that identity was independently established by Del Rosario himself and by Lt. Villanueva's admissible testimony concerning who he saw with Del Rosario at the December 10th advice of rights. The inadmissible portion of Officer Villanueva's testimony did not add anything to Del Rosario's testimony. This Court is thus of the sure conviction that the error did not prejudice either Mr. Lizardo or Mr. Cherys, was harmless error, and is not grounds for a new trial.

4. Deported Witness

Finally, Lizardo argues that the Court should grant him a new trial because the government deported an alleged material witness, Domingo Solano Febrillet, thereby violating Lizardo's Sixth Amendment right to compulsory process. There is no merit to this claim. Lizardo has not shown that he attempted to subpoena the witness or obtain a deposition of the witness' statement before he was deported. There is nothing to suggest that the government hid the witness or purposefully denied Lizardo access to the witness by sending him outside the country.

Any failure to interview the witness is attributed to the defendant himself, and is therefore not grounds for a new trial.

III. CONCLUSION

For the foregoing reasons, the defendants' motions for acquittal and defendant Lizardo's motion for a new trial will be denied. An appropriate order follows.

ENTERED this 4th day of April, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

NOT FOR PUBLICATION -- FOR UPLOAD TO WWW.VID.USCOURTS.GOV

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Crim. No. 1998-001**
RAFAEL GOMEZ DEL ROSARIO,	)	
EDDY CALISSE CHERYS, and	)	
JUAN FRANCISCO LIZARDO,	)	
	)	
Defendants.	)	
	)	

APPEARANCES:

Nelson Jones, Esq.
Assistant U.S. Attorney
St. Thomas, U.S.V.I.
For the plaintiff,

Anna H. Paiewonsky, Esq.
St. Thomas, U.S.V.I.
For the defendant Eddy Calisse Cherys

Karin A. Bentz, Esq.
St. Thomas, U.S.V.I.
For the defendant Juan Francisco Lizardo.

ORDER

MOORE, J.

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that both defendants' motions for judgment of acquittal and Lizardo' alternative motion for new trial are **DENIED.**

ENTERED this 4th day of April, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By:_____/s/_____
Deputy Clerk

Copies to:

Hon. G.W. Barnard
Hon. J.L. Resnick
Nelson Jones, Esq.
Anna H. Paiewonsky, Esq.
Karin A. Bentz, Esq.
Mrs. Jackson
Publishers
Jeffrey H. Jordan